United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7368

(42296)

To be argued by
PAULA J. OMANSKY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES C. JONES, GLORIA DEBERRY, MARY J. ECCLES, CHARLOTTE JEFFERSON, ANDREW P. JACKSON, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; JULE M. SUGARMAN, individually and in his capacity as Administrator of the New York City Human Resources Administration; THE NEW YORK CITY DEPARTMENT OF PERSONNEL; THE NEW YORK CITY CIVIL SERVICE COMMISSION; HARRY I. BRONSTEIN, individually and in his capacities as Director of the New York City Department of Personnel and Chairman of the New York City Civil Service Commission; and JAMES W. SMITH and DAVID STADTMAUER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

(Additional title appears on reverse side of this cover)

DEFENDANTS-APPELLANTS' BRIEF

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DEFENDANTS-APPELLANTS' BRIEF

Preliminary Statement

The defendants appeal from an Order of the United States District Court for the Southern District of New York (LASKER, J.), which (1) declared constitutionally invalid five civil service examinations out of a series of nine examinations which were given for positions in the New York City Human Resources Administration; (2) permanently enjoined defendants from using the results

of the examinations for any purpose, and, specifically, for making permanent or provisionsal appointments to positions in the Human Resources Administration; (3) directed defendants to develop lawful non-discriminatory selection procedures for the positions at issue, and to validate these procedures in accordance with the EEOC Guidelines on Employment Selection Procedures, as those Guidelines are now or as later revised; and (4) required defendants to submit to the Court within 30 days of the date of the order a detailed plan for the development of the new selection procedures for its approval and to furnish a copy of the plan to plaintiffs for comments on its propriety.

Plaintiffs appeal from that portion of the Order which denied their request for an award of attorneys' fees.

This brief presents the City defendants' points on their Appeal.

Question Presented

This case follows in the wake of those successfully challenging on constitutional grounds the selection procedures employed by governmental units to make appointments to civil service positions on the basis of merit and fitness. In order to succeed in cases of this kind, plaintiffs must first establish a *prima facie* case of racial discrimination. This is customarily done by introducing statistics which demonstrate that Blacks and Hispanics have fared significantly worse than whites on the selection procedure involved, which, in civil service jurisdictions, is normally a written examination.

The role of statistics in these cases is to demonstrate, by professionally accepted statistical techniques, that the examinations had a disproportionately adverse impact on

the minority candidates taking the examination which would not have occurred as a matter of chance, unrelated to race. The disparity must be of "significant magnitude to amount to a *prima facie* case of invidious discrimination". *Chance* v. *Board of Examiners,* 458 F.2d , 1176 (2d Cir. 1972).

It is our contention that the District Judge was clearly erroneous as a matter of law in holding that substantially incomplete figures relied upon by plaintiffs, from which no statistical conclusions could properly be drawn, was sufficient to establish a *prima facie* case of racial discrimination on the minorities as a whole who took these examinations.

Once the *prima facie* case is established, a heavy burden shifts to the defendants to prove that the examination was job-related to the position for which they were given. The preliminary focus is on the method of preparation of the examination. Careful preparation gives ground for an inference, rebuttable to be sure, that success was achieved in arriving at a valid examination. *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 396 (2d Cir. 1973). Here, there was evidence of careful and conscientious preparation of the examinations at issue, but defendants derived no benefit from their efforts, let alone a rebuttable presumption of success. The District Court discounted the method of preparation entirely on the basis of testimony of the expert produced by plaintiffs who found numerous grounds for criticizing the preparation of the examinations.

Regardless of deficiencies in the method of preparation of the examinations, the task of the Court was to determine if the examinations were job related to the positions at issue. This is a factual determination made by evaluating the examinations in light of the duties and

responsibilities of the positions for which they tested. Here, there is no indication from the opinion that the Court evaluated the examinations at all. Indeed, it had no need to evaluate the examinations since it had already decided against defendants on the basis of alleged deficiencies in the job analysis before it gave serious consideration to the positions being tested for and the purpose for which the examinations were given.

It is our contention that the Court below clearly erred in finding that defendants' method of test preparation was inconsistent with professionally acceptable standards of test preparation and, believing his inquiry ended at that point, refusing to evaluate the product of that preparation, the examinations themselves.

Facts

These are two civil rights actions, consolidated for all purposes, brought under 42 U.S.C. §§ 1981 and 1983 by minority applicants on behalf of a class of such persons who failed civil service examinations given for positions in the Human Resources Administration.* The *Jones* plaintiffs instituted suit on or about September 5, 1973, seeking preliminary injunctive relief restraining defendants from making permanent appointments and from terminating minority provisionals for purposes of replacing them with persons from the eligible lists established as

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* Plaintiffs sought to include within the class those minorities who had scored too low to be appointed. Cf. *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1266 (S.D.N.Y. 1973). At first, the District Court denied the motion for a class action entirely (365a); then granted the motion as plaintiffs requested (375a); then modified the class designation (377a).

a result of two examinations. The examinations at issue were both the promotional (No. 1631) and the open competitive (No. 2013) examinations for the position of Supervising Human Resources Specialist ("Sup HRS") in the City's Human Resources Administration. The complaint alleged that the examinations had a disparate impact on minorities and were job-related to the position of Sup HRS.

The appointments were scheduled to be made for September 14, 1973, and on that date the Court entered an Order enjoining appointments pending a trial on the merits (94a-96a).*

The *Williams* complaint was served on January 4, 1974, three days before trial was to begin in *Jones*. At issue here were three examinations for two lower positions in the Human Resources occupational series given the same day as those in *Jones*. They were the promotional (No. 1626) and open competitive (No. 1099) examinations for Senior Human Resources Specialist ("Sen HRS") and the open competitive (No. 1[illegible]) examination for Human Resources Specialist ("HRS"). In view of the identity of issues and proof in the two cases, they were consoli-

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* In light of the affidavit of Harry I. Bronstein, then Chairman of the New York City Civil Service Commission and Director of the City Department of Personnel (80a), the Court enjoined as well a forthcoming promotional exam for the highest position in the series, Principal Human Resources Specialist. That exam had purposely been scheduled well after the exams for Sup. HRS to afford the new appointees to Sup. HRS sufficient time-in-grade status to be eligible to take it. Although no open competitive exam for Principal HRS had been scheduled, the Order also enjoined the scheduling of any such exam. (Bronstein Affidavit, 83a).

dated for all purposes, and an injunction against appointments and termination of provisionals similar to that in *Jones* issued (188a-189a).

The trial on the merits lasted four days and was confined to the two Sup HRS exams. Plaintiffs introduced the raw figures supplied to them by defendants as proof that the examinations had a disparate effect upon minorities. That data is set forth in Table I at the end of defendants' brief. The figures showed that for the promotional Sup HRS exam (No. 1631), 138 persons took the exam. Of the 43 persons who passed the exam; 28 were White, 12 Black and 3 Hispanic. The pass rates for these groups were respectively 54%, 17% and 16%.

For the open competitive Sup HRS exam (No. 2013), 994 took the examination. Since this was an open competitive exam, defendants had information on the ethnic identity and pass-rates only of current employees of HRA. Of those identifiable, 125 Whites, or 59% passed, compared to 39 Blacks (16%), and 3 Hispanics (15%). The racial identity and corresponding pass-rates for the other individuals who took the examination, 486 individuals, were unknown. Plaintiffs offered no testimony as to the statistical significance of the known figures or of the unknown figures.

Individuals who had been serving as provisional Sup HRS's within the Agency and who, but for one, had failed the examinations, testified to their varied jobs within the Agency and to their belief that the examinations were not job-related.

Defendants introduced evidence on the structuring of the occupational series for positions in the new Human Resources Administration, the method of preparation of the second examination given for the position of Sup

HRS, and the purpose of the examination, to wit, a basic knowledge test to permit easy transfer of qualified individuals to a variety of jobs on the same level of responsibility within the Agency. Defendants' experts evaluated the job analysis prepared by defendant Department of Personnel as consistent with professionally accepted standards of test preparation, if not better.

In rebuttal, plaintiffs' expert testified to deficiencies in the job analysis and stated that he would be unable to construct an examination from it.

The trial ended on January 11, 1974. The parties had stipulated to supplement the record for relevant facts in the *Williams* case. In April, 1974, defendants supplied the figures for the three examinations challenged in *Williams*. These figures are also set forth in Table I. Of the 106 who took the promotional Sen HRS exam, No. 1626, 44 passed. Of that number 30 Whites passed, for a passing rate of 88%; 11 blacks, for a passing rate of 18%; and 3 Hispanics, or 37%. For the open competitive Sen HRS exam, No. 1099, of those identifiable from their working at HRA, 101 Whites passed (pass rate of 65%); 56 blacks (26%), and 8 Hispanics (27%). Of the 683 persons who took the open competitive, 277 were not identifiable. Of that number, 90 passed and 187 failed.

For the challenged open competitive exam for HRS (No. 1097), 606 took the examination, of which 328 were identifiable. 59 Whites passed, for a pass rate of 51%; 55 blacks for a pass rate of 31%; 7 Hispanics for a rate of 19%.

At the same time, defendants introduced statistics for the examinations in the series which were not challenged. The evidence at trial established that a total of 9 examinations were given on October 14, 1972 (Tr. 317). One examination that plaintiffs did not challenge was the pro-

motional exam for HRS (No. 1625). Three others were for the companion series of exams for Human Resources Specialist in the specialty of Manpower Development and training ("MDT"). The examinations differed by 10 questions only at each of the three levels; Sup HRS, Sen HRS, and HRS (246; 319). Between levels, there was a 40 question difference (318).

Figures for the promotional HRS exam and for the Sen HRS (MDT) and HRS (MDT) are set forth in Table II.*

In September, 1974, the District Court indicated that it was troubled by arguments raised by Defendants in their brief as to the adequacy of plaintiffs' case.** By

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* The figures for the sup. HRS (MDT) exam were not introduced because of trial counsel's belief that the Sup. HRS trial was complete when the *Williams* stipulated facts were submitted. We assume, for the purposes of argument, that the figures showed an adverse impact.

** The statement in the footnote that this issue was first raised in defendant's post-trial memorandum (326a n. 3) is inaccurate. Insofar as the note implies that defendants had an obligation to alert the parties or the Court to our legal arguments prior to our post-trial brief, we did so. Contrary to the Court's statement, defendants outlined their position in Mr. Bronstein's Affidavit in Opposition to the motion for a preliminary injunction in the *Jones* case in September, 1973 (85a). The Court had relied on the affidavit (supra, fn. p. 6) but apparently had misplaced it by the time of decision, in January, 1975. The *Williams* case was instituted three days before trial in *Jones* when opposition to the motion for a preliminary injunction would have been futile. The trial in *Jones* was restricted to the two Sup HRS Exams. Had defendants known in January, 1974 that the District Court would accept in March, 1974 our legal arguments in *Hill* v. *Human Resources Administration*, 74 Civ. 1150, where three examinations were at issue, we might well have moved to dismiss. Understandably, when *Hill* was affirmed by this Circuit, 493 F. 2d 1397 (2d Cir. 1974), we relied on it in our brief, dated April 26, 1974.

telephone, he asked counsel for their preferences on securing expert testimony on the statistical significance of the available figures.

Plaintiffs had apparently proceeded on the theory that their statistical case was sound based on the figures themselves. Before trial began, in response to one of defendants' interrogatories (169a), plaintiffs stated that they did not anticipate calling any expert witness in the course of their case in chief and that any expert would be as a rebuttal witness to defendants' testimony on the issue of job-relatedness (171a). Even after receiving defendants' post-trial memorandum, they had not moved to reopen the record.

To the Court's inquiry, counsel for plaintiffs responded that "the issue of the discriminatory impact of the [Sup] Open Competitive exam need not be reached" (290a). They advanced the legal theory, for the first time in their letter, that the promotional exam was the "top" of one list, and that if the promotional exam were held invalid, "it would . . . violate the dictates of both common sense and the law to permit appointments to be made from the 'bottom' of the list, i.e., the O.C. list" (291a).

It seemed to defendants that the District Judge was on the brink of accepting this argument. On September 12, 1974, a letter was sent from chambers stating that plaintiffs' letter of September 10 "properly states the considerations which the Court has in mind" and requesting defendants to reply (292a).

In defendants' letter of September 24, 1974, they urged the Court to adhere to its inclination to secure expert testimony (293a). In a letter dated October 10, 1974, defendants protested plaintiffs' disclaimer of their responsibility to make out a *prima facie* case on the open com-

petitive exams and urged the Court to reject the one exam theory "as an alternative to submitting expert opinion on the significance of the statistics already in evidence" (295a-297a).

On October 21, 1974, the Court requested (298a):

> "That the plaintiffs include in the expert opinion evidence which they have been directed to submit, an opinion as to whether in the case of examinations in regard to which the ethnic makeup of a group of examinees is partly known, there is evidence of record from which conclusions as to the ethnic makeup and pass-fail rate of the unkonwn portion of the group can reasonably be inferred."

Each side submitted affidavits from experts (299a-321a). While there was agreement between the experts that no statistically accurate conclusions could be drawn about the large unknown groups on the open competitive exams, the experts disagreed on what conclusions could be drawn.

The facts are set forth in greater detail in the argument portion of this brief.

Opinion Below

The District Court found that plaintiffs had established a *prima facie* case of racial discrimination. While no statistical conclusions could be drawn about the unidentified non-HRA population to indicate adverse impact, the Court found it

> "distinctly improbable that minority group members in the non-HRA (unknown) group would outperform non-HRA Whites on the same examination to the extraordinary degree necessary to bring the

over-all passing rates for minorities and Whites into rough parity."

The Court believed his conclusion buttressed by a statement of plaintiffs' expert that Blacks generally do more poorly than Whites on examinations consisting of items of the type at issue here. Defendants' statistical expert had stated that even hypothesizing an identity between the known and unknown groups and the requisite randomness, the hypothetical pass rate was inconsistent with the only known fact, the over-all pass rate, for two of the Open Competitive examinations. This led him to reject as statistically improbable the hypothesis that the disparate impact was the same for both groups. The District Court noted that defendants' expert had not stated the degree of improbability, and found, accordingly, that it was "likely" that the disparate impact was the same for both groups (335a-336a, n. 7).

As to the figures for the examinations which were unchallenged, the District Court found either that the samples were too small to be valuable or that disparate impact was shown. He found that the over-all pass rates for the known HRA group were not significantly altered when he added up the figures on the 5 challenged examinations and compared them to the total on 8 examinations.

On the issue of job-relatedness, he found that defendants had failed to meet their heavy burden of showing job-relatedness. He found numerous deficiencies in the job analysis prepared by defendants, but principally an insufficiency in the number of persons interviewed as to the duties and responsibilities of their jobs. He evaluated the content validity of the exams on the basis of opinion testimony and found that they were not content valid.

After he had decided the case, he addressed himself to defendants' testimony that they were not testing for a particular job, but for basic knowledge of the position sufficient to permit assignment throughout the Agency. He found that they had not established that there was a common core of skills which could properly be tested for or, if there were, that they had successfully identified them. He cited as the most obvious example of their failure the fact that on the Sup HRS exam, 20 to 25 questions related to supervision, whereas only 60% to 65% of the individuals in these positions actually had supervisory responsibility. Further, he noted the 10 question difference between the promotional and open competitive exams for Sup HRS and said that specific questions on the functions of the HRA on the former which were omitted on the latter in favor of more general questions could not be considered essential knowledge to all those in the title. Finally, if defendants had indeed tested for common skills, it was "nearly past understanding" why large numbers of provisionals failed, and open competitive candidates on two of the exams scored higher than those of the promotional candidates. Despite the "unique opportunity for a concurrent validation study," defendants had come forward with no evidence to suggest that plaintiffs were doing an inadequate job.

POINT I

The District Court was clearly erroneous in finding that plaintiffs had established a prima facie case of racial discrimination.

(1)

In cases alleging unintentional discrimination in public employment, statistical evidence can establish that an examination had a racially disproportionate impact upon minorities. *Chance* v. *Board of Examiners*, 458 F. 2d 1167 (2d Cir. 1972), aff'g 330 F. Supp. 203 (S.D.N.Y. 1971); *Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387 (2d Cir. 1973), aff'g 360 F. Supp. 1265 (S.D.N.Y. 1973); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F. 2d 1333 (2d Cir. 1973), aff'g in part and rev'g in part, 354 F. Supp. 778 (D. Conn. 1973); *Kirkland* v. *N.Y. State Dept. of Correctional Services*, F. 2d (2d Cir. 1975), aff'g in part and rev'g in part 374 F. Supp. 1361 (S.D.N.Y. 1974).

However, plaintiffs must prove that there has been a "significant and substantial discriminatory impact" upon the minority applicants who took the examination and must demonstrate by their statistics the existence of "a disparity of sufficient magnitude to amount to a *prima facie* case of invidious *de facto* discrimination". *Chance, supra*, 458 F. 2d at 1176.

Exacting criteria have been established in this circuit for developing statistical evidence sufficient to support a preliminary injunction. Statistical data of questionable probative force due, for example, to samples too small to be reliable, have been rejected. In *Chance*, the District Court, before it would order a preliminary injunc-

tion, directed the parties to compile a statistical survey to provide pass-fail statistics. This survey studied fifty examinations given over a period of seven years. 330 F. Supp. 203, 209 (S.D.N.Y. 1971). In reaching its decision the Court relied primarily on nine examinations, finding that meaningful conclusions could not be drawn from the other forty-one studied. *Id.* at 211-213.

The entry level and promotional examinations of the Bridgeport, Connecticut, police department were challenged in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* 482 F. 2d 1333 (2d Cir. 1973). The District Court looked at the results of 6 entry level examinations given between 1965 and 1970 before deciding that the written examinations had a discriminatory effect. The Court apparently had exact figures of the numbers of Whites, Blacks, and Puerto Ricans who both took and passed the exams. 354 F. Supp. 778, 784 (D. Conn. 1973). In *Guardians Ass'n of N.Y.C. P. Dept. Inc.* v. *Civil Service Com'n,* 490 F. 2d 400 (2d Cir. 1974), an independent organization was engaged to conduct a survey to determine the racial impact of the two most recent entry level examinations. Cf. *Carter* v. *Gallagher,* 3 EPD §8205, Finding No. 29 at 6668-6669 (D. Minn. 1971), mod. on other grounds 45 F. 2d 315 (8th Cir. 1971) (total results of exams given over a 20 year period from 1948 through 1968 considered); *Baker* v. *Columbus Municipal Separate School District,* 462 F. 2d 1112 (5th Cir. 1972) (passing rates of Black and White teachers for four tests); *Western Addition Community Organization* v. *Alioto,* 340 F. Supp. 1351 (N.D. Calif. 1972) (exact numbers of white and minority applicants who took and passed two written examinations for firemen).

No less exacting criteria are applied when only one examination is at issue. In *Vulcan Society* v. *Civil Serv-*

ice Comm'n, 490 F. 2d 387 (2d Cir. 1973), a sight survey was made of almost 14,000 applicants for an entry level firemen's examination and another of the top 8,000 men on the eligible list who appeared for a physical exam. The number of persons identified and the relative reliability of the figures led this Court to reject the intervenors' objections to the statistical case—the City defendants did not challenge on appeal the findings of racially disparate impact.

Similarly, in *Kirkland* v. *N.Y. State Dep't. of Correctional Services, supra,* complete statistics for the challenged promotional exam were known. The District Court there correctly recited the applicable standard (374 F. Supp. *supra* at 1369):

> "plaintiffs are required to do no more than demonstrate that minority candidates *as a whole* fared significantly less well than White candidates . . ." (emphasis supplied)

In his ruling in this case, the District Judge substantially departed from the strict standards enunciated in this circuit as to the proof necessary for establishing a *prima facie* case. Contrary to the law, he found that a *prima facie* case was established on the basis of incomplete, and hence unreliable statistics. Cf. *Kirkland* v. *N.Y. State Dep't of Correctional Services,* —— F.2d. —— (2d. Cir. 1975), slip op. at 5409; *Hill* v. *Human Resources Administration,* No. 74 Civ. 1150 (S.D.N.Y. March 29, 1974), aff'd 493 F.2d. 1397 (2d. Cir. 1974).

In the *Jones* case, two exams, the promotional (No. 1631) and open competitive (No. 2013) for Sup. HRS were challenged. Complete figures were available only for the 138 persons who took the promotional.* As for

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* The figures and the pass-fail percentages for the 5 examinations at issue are set out in Table I.

the 994 who took the open competitive exam, the only ones who could be identified were employees of the Human Resources Administration. The ethnic identity of 49% of the candidates (486/994) was unknown. There were more unknown passers (183) than the total number of known passers (172). The ethnic identity of 47% of total failures (303/639) was unknown.

Similarly, in the *Williams* case the data is substantially incomplete. For the promotional (No. 1626) and open competitive (No. 1094) examinations for Senior HRS, the only persons identified were employees of the Human Resources Administration. For the population at large who took the open competitive, the ethnic identity and pass-fail rates of 277, or 40% (277/683) was unknown. The open competitive exam (No. 1097) alone* was challenged for the lower level HRS exam, and, again, the ethnic identity and pass rates of 278 were unknown. Contrary to the District Court's conclusion, the figures did not show a sufficient disparity among all the minorities and non-minorities who took the exams to make out a *prima facie* case; rather, the figures indicated that disparity among HRA employees.

Putting aside for the moment the question of whether the disparate impact on the known HRA population should have been enough to establish a *prima facie* case, there was no evidence introduced at trial or in the experts' affidavits that the disparate impact on the known HRA population could be carried over to the unknown population. Indeed, no statistical conclusions whatever could be drawn about the large numbers who took the open competitive exams at each level, amounting, in descend-

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* The promotional HRS exam was not challenged, but the pass-fail figures resulting from it were introduced into evidence.

ing order, to 49%, 40% and 46% of the total exam taking populations.

The only case in this circuit which has dealt in any way with a broad-based attack on a series of examinations where ethnic and corresponding pass-fail data were substantially unknown for large portions of the separate exam-taking populations was *Hill* v. *Human Resources Administration*, No. 74 Civ. 1150 (S.D.N.Y. March 29, 1974), aff'd 493 F.2d 1397 (2d. Cir. 1974).

In *Hill*, three in another series of examinations given for positions in the Human Resources Administration were challenged. While all were open competitive exams, the lowest level examination was not written, but a "training and experience" exam where candidates are given scores based on those factors (see 180-181). The ethnic identity of only 9% of the candidates was known. The second level, however, was a written test. 704 persons took the test; 215 passed and 487 failed. The ethnic identity of 44% of the passers was known; Whites passed at the rate of 72%; Blacks at the rate of 45%; Hispanics, at the rate of 50%. For the third examination, also written, 404 took the examination; 266 passed. The ethnic identity of 28% of the passers was known. Whites passed at a rate of 95%; Blacks at the rate of 61%; Hispanics, at the rate of 93%. The District Court found, in part, that these figures were too unreliable to establish a likelihood of success on the merits, i.e., a *prima facie* case. The denial of the preliminary injunction was affirmed without opinion by this Circuit. 493 F. 2d 1397 (2d Cir. 1974).

In the instant case, the District Court distinguished *Hill* in a footnote, saying that plaintiffs here had presented data as to a considerably higher proportion of

candidates. However, the 44% of passers known for the second level examination in *Hill* is not markedly different from the 49% of known passers for Exam. No. 2013, for Sup HRS. In gross numbers alone, these were more unidentified candidates here than in *Hill*. To distinguish the cases on the higher number of known candidates avoids the issue.

The District Court went on to say that "substantial disparate impact was not shown, even as to the available samples, in all three examinations in *Hill*." This was due, in part, to the accident of plaintiffs' timing of their challenge. By the time suit was instituted in *Hill*, defendants had already begun to interview candidates from the eligible list. For the written exam where 44% of the passers was known, and Whites passed at a 72% rate compared to 45% and 50% for Blacks and Hispanics respectively, of the 64 persons who appeared for interview when called from a certified list containing 120 names, 43 were minorities and 21 White (Appellants' Appendix in *Hill*, p. 59a). In this case, defendants were not permitted to call the list for interview because of the issuance of the preliminary injunction. Had those on the list been called, the overall impact of these examinations could, of course, have been more accurately gauged. By the same token, even without allowing the listed candidates to be called, the actual impact of these examinations on White and minority candidates could have fairly been ascertained by survey methods, an undertaking which plaintiffs never attempted, and which, we contend, should have been required by the court below.

In *Kirkland* v. *N.Y. State Dept. of Correctional Services*, —— F.2d —— (2d Cir. 1975), slip op. at 5409, this Court made reference to the "incomplete, and therefore unreliable" data submitted with regard to previous

examinations. In *Douglas* v. *Hampton*, —— F.2d —— (D.C. Cir. 1975) a statistical survey was made of approximately 50,000 college graduates of the 153,000 who customarily took the FSEE test: the "sample from which the statistics was derived was random, in the statistical sense, and large enough to be significant." There is no argument here that the identification procedures were determined on a random basis. Cf. *Hill* v. *Human Resources Administration, supra,* p. 5.

An affidavit of plaintiffs' expert, Dr. Richard Barrett, was submitted on the statistical aspect of the case. He used the Chi Square test to show that there was a disparate impact upon minorities who work for HRA and who took either the promotional or open competitive exams (303a).*

The major issue was, the Court noted, still unresolved: "Whether the data for the entire group of candidates on Nos. 2013, 1097, and 1099 would show the same results as Barrett calculated on the basis of the known candidates on those examinations" (333a). There was no way of knowing, as Barrett admitted, "strictly speaking". Defendants' expert, Professor Grammas, agreed (310a):

> "It is my opinion that neither racial break-down nor pass-fail can be inferred about the unidentified test-takers from the known group and that there is no statistical basis for postulating a racially disparate impact on the results available for the known group."

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* It should be noted that Dr. Barrett did not use the Chi Square test for Hispanics separately from Blacks, although the sample size was, except for exam No. 1625, undoubtedly sufficient. Cf. *Chauel, supra,* 330 F. Supp. at 213. The pass rates for Blacks and Hispanics did not show the same disparity on all the challenged exams (316a).

In short, no statistical conclusions would be drawn about 49%, 40%, and 46%, of the separate exam taking population for the three exams.

The District Judge solved his dilemma by substituting a personal standard of probability for a statistical standard of probability. The opinion quotes from Dr. Barrett (333a):

> "Strictly speaking such a determination can be made only if there is reason to believe that those whose identity is not known are a random sample of the total group. There is, of course, no way to make this determination. However, the size of the Chi Square statistics reported above . . . is so great that those whose race or ethnicity is unknown would have to differ in an unrealistically large degree from those whose identity is known to lead to the conclusion that the tests are free from adverse impact."

Dr. Barrett went on to say (302a):

> "In the absence of compelling evidence that those of unkown identity are from a totally different group than those whose identity is known the results of the above analysis must apply to them as well."

While there is no statistical basis for applying the results of the known group to the unknown group, Dr. Barrett is prepared to assume they apply unless defendants prove otherwise. The District Court adopted his reasoning.

Concluding that Barrett's affidavit accorded with common sense, the District Court found it (334a):

> "distinctly improbable that minority group members in the non-HRA (unknown) group would outperform non-HRA whites on the same examination to the extraordinary degree necessary to bring the overall passing rates for minorities and whites into rough parity."

This type of analysis undercuts the purpose of the statistical case. The District Court's expectations as to the performance of minority applicants have no place in determining whether plaintiffs have established a *prima facie* case of racial discrimination based on hard statistical data. See *Chance* v. *Board of Examiners, supra.* There is no statistical probability, one way or the other, as to the performance of the unknown candidates or even as to their identity. There are not two different standards of probability, one when a statistically sound random sample is available; another when it is not. In cases of this nature the courts deal only with statistical probabilities: "statistical evidence by its very nature deals with probabilities rather than certainties." *Vulcan* v. *Civil Service Commission,* 360 F. Supp. at 1270.

In imposing his own personal standard of probability, the District Court exceeded his "limited office of . . . finding that black and hispanic candidates did significantly worse in the examination than others". *Vulcan* v. *Civil Service Commission,* 490 F. 2d *supra,* at 390.

The District Court believed that his conclusion as to the probability of minority performance in the unknown population was buttressed by Dr. Barrett's observation, contained in his post-trial affidavit, that exam Nos. 2013, 1097 and 1099 are "made up of items of the type on which Blacks and Hispanics generally do more poorly than whites." This statement was not subject to cross-exam-

ination. The statement may be Dr. Barrett's personal opinion.* At best, its meaning is unclear. There is "overwhelming evidence that, on the average, black people and other disadvantaged groups perform substantially less well than Whites on generalized 'intelligence' or 'aptitide' tests." Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promoting 82 Harv. L. Rev. 1598, 1639 (1969). See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971), dealing with standardized *aptitude tests*. The tests at issue here were not such tests. Rather, they were tests geared to the content of the position.

Testimony of this nature has not been relied on, if mentioned at all, in prior cases dealing with discrimination in public employment, where written tests were involved. See, e.g., *Chance* v. *Board of Examiners, supra; Vulcan* v. *Civil Service Commission, supra; Kirkland* v. *N.Y. State Dept. of Correctional Services, supra.* Indeed, it has ominous implications for civil service jurisdictions such as New York where most examinations are competitive written examinations. See *Kirkland* v. *New York State Dept. of Correctional Services,* F.2d (2d Cir. 1972), slip op. at 5411, 5412.

Defendants below had cited *Gonzalez* v. *City of New York,* 4 E.P.D. ¶ 7867 (S.D.N.Y. 1972), for the proposition that "numbers comprise a critical element of what the case purports to be about" and that the numbers there were "neither fully revealed nor decisive in their incomplete state at the moment." The Court distinguished

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* Dr. Lopez, plaintiffs' other expert, testified that for a knowledge test a pen and pencil examination should be given if the applicants know how to read and write (Tr. 684).

Gonzalez on the ground that the only figures known there were of the 5 plaintiffs. If a Court is prepared to rely on statements as to the general performance of minorities on "items of (this) type" the sufficiency of the *prima facie* case becomes a matter of the Court's impression, and not a matter of statistical proof. Arguably, on the same figures, *Hill* could be decided differently.

The combination here of two erroneous elements, the District Judge's personal standard of probability plus a statement as to general performance of minorities on "items of this type", does not make up for the deficiencies of proof in plaintiffs' statistical case.

The Court below also betrayed a serious misunderstanding of the opinion of defendants' statistical expert in stating that his opinion "is not inconsistent with our conclusions as to 2013, 1099, and 1097". Professor Grammas flatly stated that there was no basis for drawing *any* statistical conclusions as to the unknown population, for the obvious reason that nothing was known about that group. He was not invited to give his personal views as to the likely performance of unidentified minorities. In the final analysis, only the Court could decide what was or what was not inconsistent with its belief as to a "realistic likelihood" of performance by minorities since his personal belief was not susceptible of statistical proof.

Similarly, the District Court seems to have missed the point of Dr. Grammas' postulation of a set of assumptions. Nothing is known about the non-HRA population except the over-all pass rate. Professor Grammas was willing to test the hypothesis that the groups were identical* against the only known fact, the over-all pass rates.

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* Dr. Barrett simply assumed this to be true in the absence of contrary "compelling evidence".

To do so, he had to assume that the non-HRA population broke down identically to the HRA population as to race and pass-rates and that the non-HRA population was a random sample of the total population—otherwise, even hypothetically, he would be measuring apples and oranges. Professor Grammas found that even making the assumptions, the hypothetical pass rate significantly differed from the observed pass rate for two out of the three open competitive exams at the 95% level of confidence. This meant that at least one of the three assumptions was invalid, although there was no way of knowing which one. Professor Grammas, as a statistician, would reject the working hypothesis that the disparate impact was the same for the unknown groups as for the known groups on two of the exams (314a).

If anything, this statistical analysis should have given the District Court pause. Instead, it becomes fodder for its personal impression of the statistics. Thus, the District Court faults Dr. Grammas for not indicating the "*degree*" of probability "other than to indicate that it is something less than 95% probable". Both statistically and legally the 95% level of confidence is the standard level at which figures are considered statistically significant.* *Albermarle Paper Co.* v. *Moody*, —— U.S. —— (1975), 45 L Ed 2d 280, 304. Notably, the same criti-

* The District Judge goes on to point out that none of the three assumptions Professor Grammas made had to be true as a matter of fact. This is, of course, true if we had sufficient information about the non-HRA group from which one could draw statistically reliable conclusions. The point is that there is no information about the non-HRA group except the over-all pass rate, and Professor Grammas merely tested by accepted statistical means the hypothesis that the pass rates were the same in both groups against that known fact.

cism is not applied to Dr. Barnett, who is not required to indicate what the "unrealistically large degree" is by which the pass-fail rate of minorities in the unknown group would have to differ from the rates in the known group. The Court's own reference to an "extraordinary degree" is a matter of its own impression.

The startling conclusion the Court reaches is that, since defendants did not prove how improbable "improbable" was the Court was free to say that it was probable: "although it is not statistically certain that the non-HRA groups showed the same disparate impact as the HRA groups, it is indeed likely that they would (336a)."

We submit that the Court's analysis is incorrect. Plaintiffs had the burden on their case in chief to prove, by reliable and significant statistical evidence, that the examinations had a disparate impact on minorities as a whole. *Chance* v. *Board of Examiners, supra; Kirkland, supra,* —— F. Supp. at ——. When they failed to make the showing, the Court was not free to substitute its own personal standard of probability nor to shift the burden to defendants to disprove incomplete statistics. The only probabilities which the Courts will recognize are statistical probabilities. *Vulcan Society* v. *Civil Service Commission, supra,* 360 F. Supp. at 1270.

Defendants introduced figures on two open competitive exams for the sister series of the Manpower Development and Training ("MDT") specialty, Exam. No. 1094 for Sen HRS (MDT) and Exam No. 1095 for HRS (MDT)* as well as figures for the unchallenged HRS promotional exam No. 1625, set forth in Table II to the brief. They

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* The figures for the Sup HRS (MDT) exam were not introduced. See fn. p. 9, *supra.*

were introduced for two purposes: (1) to point up the weaknesses in plaintiffs' *prima facie* case based on substantially incomplete, but impressive looking, statistics; and (2) to bring to the Court's attention the consequences of challenging part of a series of substantially identical exams.

The statistics for the MDT exams and the promotional HRS exam did not show, on their face, disparity (Nos. 1094 and 1625) or, disparity to the same degree (No. 1095).* These examinations were 87.5% identical at each level to the ones challenged. Furthermore, the promotional HRS exam was conspicuous by its absence among the challenged exams, since the promotional exams for Senior and Sup HRS were challenged and were indeed the only examinations on which complete figures were available.

In short, not only were plaintiffs' statistics incomplete with respect to the challenged examinations, but also plaintiffs' selective attack on only certain of the examinations in this series is misleading in not showing the entire, overall impact of the series of examinations. Under these circumstances, we submit, it was clearly erroneous for the District Court to hold that the plaintiffs had made out a *prima facie* case for setting aside the challenged examinations. As we point out in the following points, in fact these examinations were job related, but before even getting to consideration of these points, we would urge that this Court should most care-

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* It should be remembered that at the time of post-trial briefs, no expert testimony had been introduced. The failure to offer evidence as to the statistical significance of the differential passing rates for three exams was grounds for reversal of a preliminary injunction in *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F. 2d 1029 (3d Cir. 1973).

fully consider—and reject—the approach adopted here by the District Court in deciding that these plaintiffs had made out a *prima facie* case. Approval of that approach can only have the most disastrous consequences for civil service jurisdictions generally, and for this agency in particular. In addition, it may well work unfair hardship on successful candidates on such examinations.

Should plaintiffs prevail, and the five challenged exams be struck down as constitutionally invalid, there would be a substantial group enjoying the benefits of permanent civil service appointment from the four unchallenged tests, although they would have succeeded on the basis of exams 87.5% identical to the challenged exams. This could only h[illegible]iten the resentment and divisiveness among the candidates which Judge Weinfeld sought to avoid in *Vulcan, supra,* 360 F. Supp. at 1278. The result would be particularly harsh for the open competitive HRS exam. The promotional exam, on which Blacks outperformed Whites, was given for the very same position for which the open competitive exam was given, yet appointments were based on that examination.

In addition, striking down these examinations may very well be unfair to the minority group members who took and passed them. Here a total of 197 minority group candidates out of a total of 540 (340a) or 36%, passed these examinations; these individuals can now not be appointed to the permanent civil service positions to which they may be entitled.

These hardships are in addition, of course, to the hardship imposed on the public by setting aside these examinations if in fact they were proper examinations. Under all of these circumstances we submit that it was error for the District Court to hold that plaintiffs had

made out a *prima facie* case with their partial and selective statistics.

As has generally been required in cases of this nature, plaintiffs should have been required to make a proper statistical case—based on a study of the universe of candidates who took these examinations or on a proper survey of such candidates. This plaintiffs never did, and this should be considered a fatal defect in their proof. On this ground alone, their complaints should be dismissed.

(2)

It is our position that even as to the challenged promotional examinations, where, concededly, disparate results were shown between whites and minorities were shown, it should be held that plaintiffs failed to make out a proper statistical *prima facie* case. We take the position for the reason that these examinations were in fact part of a related series of examinations and the number of candidates on each of the promotional examinations was relatively small. Under these circumstances, where the evidence was available to plaintiffs to put in a proper statistical showing on the entire series of examinations, but they chose not to do so, they should not be allowed to succeed in a selective challenge to only a part of the series. If plaintiffs had tried their case the way they should have been required to try it, i.e., by showing the results of a proper survey of the entire series, the complete picture as to the effect of these examinations would have been known. Plaintiffs should not be allowed to succeed, even partially, as a result of their own default in coming forward with proper proof.

As it was, 35% of total passers (15/43) for the Sup HRS promotional list and 32% (14/44) for the Sen HRS

promotional list, were minorities. This is a far cry from *Vulcan,* where only 4.5% of those who passed the qualifying medical and physical examinations as well as the written examinations were minorities (360 F. Supp. supra at 1269), and minorities comprised only 5% of the Fire Department (*Ibid,* n. 11).

(3)

The District Court in its opinion had already gone through the reasoning discussed above to find that plaintiffs had made out their *prima facie* case. It therefore took the approach that the figures defendants had introduced, if defendants were to be successful in their defense, had to rebut plaintiffs' established *prima facie* case. It found that they did not, and disposed of our equitable arguments "more easily".

The District Court found that the White sample for Exams No. 1094* and 1625**, was too small to be valuable and that a change in figures by merely two would change the results. As to Exam No. 1095, "only 17 whites took the exam" but in any event whites passed at a sig-

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* There is, again, no statistical basis for the Court's conclusion that a White sample of 15 for Exam No. 1094 is too small to be valuable. In *Chance,* as the District Court itself pointed out, "Judge Mansfield relied on figures from the nine examinations taken by 10 or more minority candidates . . . 330 F. Supp. at 209-214"

** The smallness of the sample may be a factor in a Court's not relying on it in assessing the statistical case. However, if plaintiffs had made out their case on the open competitive exam alone, and the promotional figures for an exam 87.5% identical were statistically insignificant, there would be all the more reason why the fate of the promotional exam should be joined to that of the open competitive. Instead, it "easily disposed" of our argument by holding that plaintiffs are not required to challenge more than one examination, citing *Vulcan* where a comparable situation did not exist.

nificantly higher rate than minorities or blacks. To demonstrate the "shaky factual basis for defendants' argument", he aggregated the results first on five exams and then on eight exams to show that the "overall pass rates are not significantly altered."

In aggregating the results, the District Court fell back on the statistics available for the known HRA population and ignored our equitable arguments. While the figures in the aggregate may have appeared impressive to the Court, they do not advance the understanding of the issue; one would expect similar pass rates for the HRA employees who presented themselves for the MDT exams "because it is the same group, HRA employees, and almost the same exam. It provides us with no information about the non-HRA group" (318a).

The point of introducing the statistics from the three MDT exams and the promotional HRS exam was not to prove that no disparate impact was discernible on those exams, and therefore, that plaintiffs had not made out their *prima facie* case. The incomplete statistics on the MDT exams could hardly be introduced by defendants as statistically significant when we disputed the challenged exams on precisely those grounds. Our argument was that their varying results should have confirmed the proper legal conclusion that the incomplete statistics on the challenged exams were insufficient to make out a *prima facie* case and, considering the impact on the public interest, that equitable relief should be denied.

The District Court was clearly erroneous, as a matter of law, in holding that incomplete, and hence unreliable, statistics were sufficient to establish plaintiffs' *prima facie* case; and, in failing to give proper consideration to the effect on the public interest if plaintiffs were to prevail and substantially identical exams were allowed to stand, abused his discretion in granting injunctive relief. The decision must be reversed.

POINT II

Defendants' method of preparation of the examinations was consistent with professionally acceptable standards of test preparation. The District Court was clearly erroneous in finding otherwise.

The District Court correctly recited the "ground rules" in cases of this nature: once plaintiffs have established a *prima facie* case of racial discrimination, the burden shifts to defendants to prove that the examinations are job-related. *Kirkland* v. *N.Y. State Dep't of Correctional Services*, —— F. 2d —— (2d Cir. 1975), aff'g in part and rev'g in part, 374 F. Supp. 1361 (S.D.N.Y. 1974); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), aff'g 360 F. Supp. 1265 (S.D.N.Y. 1973). Notwithstanding the lack of any job analysis in *Vulcan*, Judge Weinfeld evaluated the examination itself, and, based on the testimony at trial, concluded that defendants had not sustained their heavy burden of proving that their test was "reasonably constructed to measure what it purports to measure." 360 F. Supp. at 1272, quoting *Chance*, 458 F.2d at 1174.

This Court approved the approach taken by Judge Weinfeld (490 F.2d at 395):

> "As we read his opinion, the judge developed a sort of sliding scale for evaluating the examination, wherein the poorer the quality of the test preparation, the greater must be the showing that the examination was properly job-related, and *vice versa*. This was the point he made in saying that a showing of poor preparation of an examination entails the need of 'the most convincing testimony as to job-relatedness.' The judge's approach makes ex-

> cellent sense to us. If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra,* careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand. See *Chance, supra,* 458 F. 2d at 1173."

While paying lip service to the applicable law, the District Judge in this case turned the legal standard on its head. The District Judge's thinking was so dominated by the deficiencies he found in job analyses which were admittedly conscientiously prepared,* that he failed to evaluate the examinations themselves in any detail, if at all. In effect, defendants were graded on their job analysis. Indeed, the District Judge had already decided the case against defendants on the basis of the job analyses before he gave serious consideration to the purposes for which defendants said they were testing. Ironically, defendants had fared better in *Vulcan* where there was no job analysis at all. If the decision here is read in the order in which it is written, the reader can only conclude that the District Court did not have clearly in mind what the position of Human Resources specialist entails or what defendants tried to accomplish by the examinations.

It becomes necessary, then, for defendants to begin where the District Court left off: to describe the duties

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* The sincerity of our efforts was largely responsible for the denial of plaintiffs' request for attorneys' fees (365a-370a).

and responsibilities of the Human Resources Specialists and the purposes for which they were tested.

The Human Resources Administration was created in 1966 to consolidate under one roof a variety of welfare, social services and man-power programs (349a, n. 14). The mission of the agency was "to combat poverty and human misery" (Defs. Exh. J, "HRA Basic Facts 1972", p. 7).

Ambitious as was the concept of the agency, its staffing was even more innovative. One of the considerations in establishing the agency was an attempt to bring minorities into the operational structure of City government, rather than only serving them as part of the Agency's client population. The Agency went out of its way to recruit minorities who at first served provisionally (344).

There then began the lengthy classification process to set up the civil service occupational series. For each proposed title, e.g., Human Resources Specialist, the functions of the position, the qualifications necessary, and the selection criteria were developed jointly by the New York City Department of Personnel and the Human Resources Administration (122a-124a).

In 1968, because of the large numbers of provisionals serving, the Civil Service Commission ordered that examinations be held (Tr. 343). As soon as the Notices of Examination were published, the City was sued. *Matter of Lillard* v. *Ginsberg* (Sup. Ct., N. Y. Co.), N.Y.L.J., 7/12/68, p. 10, c. 5. Petitioners there argued that they were federal, not City employees, and hence not subject to the requirements of the City's Civil Service system, and, further, that the administration of examinations was antithetical to the broad purposes of the Economic Opportunity Act requiring the maximum feasible participation of the poor. In dismissing the petition, Justice Mur-

phy used language which was prophetic of the law to come in the area of discrimination in public employment:

> "The assumption [is] that the 'poor' will be unable to qualify for and achieve satisfactory scores in Civil Service tests. Thus, the Civil Service, or merit system once urged by the then avant-garde social philosophers as necessary to insure that those then discriminated against would be able to obtain government employment based, solely, upon merit, is now urged to be a roadblock to the upward mobility of the present poor."

The examination for Sup HRS in 1968 was so geared to protecting incumbent provisionals that credit was given for working in the Agency (Tr. 345-346); a mandatory experience requirement was "at least one year . . . in an agency whose primary function is the administration of anti-poverty programs such as community action and development manpower and skills training for the disadvantaged, community relations, etc." (Defs. Exh. C).

The list established as the result of the 1968 training and experience exam for Sup HRS was broken down into three "specialities"* or "parentheticals", namely (1) Management, (2) Community Programs, and (3) Manpower Development and Training (Ibid.). The term "speciali-

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* At the outset of the trial, all the indications were that plaintiffs' challenge to job-relatedness was based on the failure to give examinations in the "specialties" as distinct from the "generic" title (54a-57a; Tr. 34-37, 58). In view of the adverse testimony of their expert on this point (Tr. 656-657) and the fact that the lists from the two lower titles were never broken down into specialist (Tr. 39; 64). Plaintiffs abandoned their position. In any event the Court did not base its decision on the difference between them.

ties" was a short-hand reference to the individual departments to which eligibles would be assigned (Tr. 350).

There was an additional reason for breaking the list down into specialties: it created small lists and, in effect, assured that incumbents would be appointed (Tr. 346). At the same time, it permitted the agency to appoint provisionals to the "generic" title of Sup HRS (Tr. 348-349) without running afoul of the Civil Service Law since there was no outstanding eligible list for the generic position, only for the specialties.

During this time, the Human Resources Administration was rapidly expanding (Tr. 348; 350). Within six months of the establishment of the 1968 lists, the lines of demarcation between the specialties was obscured (Tr. 348). There was a commingling of the specialties and generic positions throughout the Agency (Tr. 348; 359). People were transferred as the needs of the Agency dictated (Tr. 349).

In 1971, the Civil Service Commission ordered new examinations for the "generic" position of Sup HRS, a position in which approximately 100 provisionals were serving (Tr. 226; 243; cf. 374).*

Leonard Rosenberg of the Department of Personnel was assigned to the Bureau of Examinations and in 1970 was made responsible for the Human Resources occu-

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* The number of persons serving provisionally becomes important in assessing the sufficiency of the sample interviewed by Leonard Rosenberg. Defendants' Exhibit L shows that approximately 180 provisionals were serving in December, 1973. In light of the evidence, it is inconceivable that the number of provisionals in this rapidly expanding agency remained constant for over two years, between October, 1971, when the job analysis was prepared, through December, 1973, the eve of trial. Cf. 374-376.

pational series (Tr. 172). He worked closely with the then Director of HRA Personnel, Harold Basden, and the Assistant Director of HRA Personnel, Howard Matelli (124a). For the year and a half before the examinations in issue were ordered, he had contact with Agency officials on the average of two or three times a week (Tr. 175); 50% of his time was spent on HRA matters (Tr. 221). He became involved "with the title structure itself" (Tr. 219; 221). He brought to his assignment long-time experience in classification work, in which a job description is developed based on the work performed (Tr. 172-178; 366).

Rosenberg in all probability took the examination in the Personnel Examiner series prepared by plaintiffs' expert, Dr. Felix Lopez (Tr. 651). Lopez testified that persons who took the test, like Mr. Rosenberg, would have to know the purposes of a job analysis and be familiar with the various ways of conducting it (Tr. 655).

Rosenberg contacted HRA in his preparation for the challenged series of exams and asked them to arrange a series of visits. His restriction was that he could interview only those incumbents holding the permanent title of Sup HRS or any individual holding a higher title (Tr. 193).* He saw those persons designated by the Agency in interviews lasting a week (195ae1).

Of approximately seven permanent Sup HRS's, Rosenberg interviewed four, and four additional persons in higher titles, and observed the work of others on the job

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* The purpose of this long-standing policy is to prevent any undue advantage that might flow to the person who is interviewed for a description of the duties and responsibilities of the position to be tested for on the examination. It serves a salutary purpose in the well-established City agencies.

(Tr. 225). One of the persons interviewed was Howard Matelli, the Assistant Director of Personnel.

At the time he did his interviewing, Rosenberg already had a good grasp of what Sup HRS's did. The District Court relied on Rosenberg's job analysis to point out (349a):

> "Employees holding the generic title Sup HRS may do jobs ranging from payroll and purchasing of supplies to public relations or program planning (Defendants' Exhibit F) in twenty different kinds of programs (Tr. 381). Moreover, although there are a number of small clusters of Sup HRS's who do approximately the same kind of work, there are no large-sub-groups capable of easy categorization (Tr. 382)."

It was clearly impossible to test over 100 individuals doing different jobs on the specifics of their individual jobs, nor was that the City's intent. Individuals were to be tested for sufficient basic knowledge of the functions of the Agency and sufficient skills to do the work which they might be reasonably called upon to perform as a Supervising Human Resources Specialist (199; 241; 252).

Mr. Rosenberg testified (Tr. 243):

> "We are not giving an examination for each and every position that holds the title of Supervising Human Resources Specialist. We are giving an examination for the title which encompasses a variety of people in various types of activities with different types of responsibilities, though essentially all being considered similarly alike to warrant the same title and the same pay.

> We were giving an examination on the basis of all the knowledge we had for the total position which . . . at that point in time, comprised over a hundred individuals, and might grow more or might shrink. We didn't know what the future would bring.
>
> And we devised a plan that tests for the ability of the individual so that . . . if they get transferred . . . [they might] perform satisfactorily regardless of the exact assignment that the individual might receive at any one point in time."

And, as plaintiff Jones testified (Tr. 54):

> "At the time I took the examination I had no idea I would ever be working in labor relations. At the time I took examination, I was working in personnel."

The job analysis was introduced as Defendants' Exhibit F (195ae1-3). There were eight areas in which Sup HRS's should be proficient, running the gamut from knowledge of the functions of HRA and its constituent agencies to language skills and chart interpretation (Ibid., F).

The District Court found that a sample of four employees in the Sup HRS title was critically insufficient for an understanding of the duties and responsibilities of the position. Since this factor figured so prominently in the Court's decision—indeed, his entire decision hinged on it—we discuss it at length.

A professionally acceptable sampling is anywhere from 10-25% (Tr. 499; 582). That is, if the City had engaged the services of an independent psychologist, such as Dr. Lopez, to prepare an examination for the position of Sup

HRS, about which he knew nothing, a sample of 10% might be sufficient (Tr. 582). As noted above, in 1971, when the job analysis was done, there were approximately 100 provisionals (Tr. 243). A total stranger to the City and to the Agency could have interviewed ten persons and that number would not be inconsistent with professionally acceptable standards.

The exact number of persons interviewed by an outside expert in testing would of course be relevant in determining whether the interviewer had obtained a good cross-section of the duties of the position (672). Where there is a Department of Personnel in existence, a fair sampling depends on the individual who is assigned the examination, the degree to which the individual is aware of the operations of the agency, the types of contacts and the levels of contacts the individual has with that agency on a day-to-day basis (Tr. 229). The exact number, four in the Court's view, cannot fairly be determinative here, where Rosenberg was intimately familiar with the contours of the position: he had been in contact with agency officials for a year and a half on the average of 2-3 times a week (Tr. 175).

The District Court dismisses Rosenberg's prior experience in HRA matters on the ground that his "private knowledge" could not have been of benefit to the person constructing the exam unless such knowledge was committed to writing in the job analysis. However, the purpose of a job analysis is to become familiar enough with the position so that a determination can be made as to which knowledge or skills can and should be tested for. This is an inferential process (Tr. 525). Rosenberg had designated those areas in the test plan (195af1). Once the areas were designated, the test constructor takes

over (285). It is not necessary to tell the test constructor every detail about the job (cf. 652).

Helene Willingham, who prepared the examinations, was herself acquainted with the position (259; 262). In any event, in this age of specialization, it is standard practice to divide the functions of job analysis and item preparation (Tr. 406).

As it is, there is ample corroboration that Rosenberg had a very thorough knowledge of the duties of a Sup HRS. Plaintiffs describe their duties in essentially the same way that Rosenberg did (47a-49a; 60a-62a; 65a-66a; 197a-199a). If Rosenberg had interviewed all the plaintiffs' witnesses who testified, it is hard to see that his knowledge of the position would have been appreciably changed. Furthermore, the "tasks observed" were carried over into the Notice of Examination as "examples of typical tasks." If the "typical tasks" were not descriptive of the jobs they were doing, it was open to plaintiffs to challenge the Notice of Examination. Cf. *Matter of Lillard* v. *Ginsberg, supra.* Finally, the Agency reviewed the Notice of Examination (Tr. 200) and apparently had no objection.

The District Court cautions against over-estimating Rosenberg's prior experience since it occurred primarily in the area of classification. Classification or desk audits can serve as the basis for an examination (Tr. 230-231; 431). Common sense tells us that the specific duties of a position to be described for purposes of classification do not change merely because the purpose is to prepare a job analysis. The difference between describing the duties and responsibilities of a position for purposes of classification, on the one hand, and test preparation, on the other, is in singling out the specific knowledge or abilities to be tested for, and weighting them properly.

Cf. *Kirkland* v. *N.Y. State Dep't of Correctional Services, supra,* 374 F. Supp. at 1374. There is no question here but that defendants set out to do a job analysis in preparation for an exam.

The District Court counts only the four permanent Sup HR's whom Rosenberg interviewed. The fact is that Rosenberg spoke to eight individuals with practical working knowledge of the agency. One of them, Howard Matelli, had been involved with setting up the HRA occupational series from the start of the agency (123a). Supervisors are an obvious source of information about the duties and responsibilities of lower positions and consulting supervisors is standard professional practice (Tr. 578). While it may have been desirable to have a larger sampling of incumbents (Tr. 433-34), the knowledge gained from the supervisors should not have been subtracted from Rosenberg's knowledge of the position as if it did not count. The purpose of the Court's inquiry into the method of preparation of the exam is not a mathematical exercise. If there were 80 provisionals instead of 100, Rosenberg's interviews of 8 persons with knowledge of the position of Sup HRS, in combination with his own working knowledge, would have been sufficient beyond cavil. It might well have been sufficient for an outsider called in to do a job analysis.

The District Judge evaluated the testimony of defendants' experts in light of his belief that the sum total of Rosenberg's knowledge about the duties of a Sup HRS derived from four individuals out of a group of 180, or a 2% sample. In fact, defendants' experts gave high marks to his efforts. Dr. Katzell testified that the job analysis (Tr. 409):

> ". . . was much better done than many with which I had to work; it was more complete; the end

> product, the test plan were typical of test plans where knowledges and skills were categorized and proportional weights are listed to guide the person developing the examination."

The job analysis was "better than consistent" with professional standards (Tr. 409).

As an added check, defendants asked Dr. Williams to make an inquiry parallel to that undertaken by Leonard Rosenberg in preparing the job analysis. Dr. Williams was examining the content validity procedure (Tr. 495; 504). He interviewed 12 different people over a period of 4½ days (Tr. 496-497). He found the same variety of duties as did Mr. Rosenberg (Tr. 497):

> "ranging from people who had the responsibility of policy and design . . . to people who did a lot of report writing . . . to people who were involved with personnel and personnel review procedures . . . There was a person in—I suppose I refer to it as the transportation distribution center where a lot of that kind of work was done—to people who were handling the low level budget."

Since Rosenberg was not going to test for a specific intra-agency job, it is hard to see that interviewing these 12 would have changed the inferences he made as to the skills to be tested. It might, however, have prevented the District Court's getting bogged down on the sample size. Dr. Williams testified that, given the policy restraints, "it was a very well done job of doing both the job analyses and the test construction. Under the circumstances, I would say it was very good" (Tr. 498).

It is, of course, within the District Court's discretion to credit the testimony of the other side's expert. How-

ever, if it had credited Dr. Lopez's actions as well as his words, the result in this case would have been markedly different.

Dr. Lopez had, until recently, spent his career in public personnel administration (560; 534; 630). Indeed, he had been extensively involved in preparing exams for the City of New York since about 1953 in the Personnel Examiner Series, and probably prepared the one Rosenberg took (Tr. 563, 651). Those examinations tested for knowledge, and he testified it was appropriate to test for knowledge (Tr. 627; 654; 656).

About four years ago, Dr. Lopez started his own business and now employs five persons (Tr. 639). Whereas he used to test for knowledge, he now tests only for traits (Tr. 571; 644). He has tested for traits such as perception, memory, concentration, problem solving (Tr. 645) and decision-making ability (Tr. 579) which apparently was the only trait he measured for three different levels of fire officers (Tr. 669). Some of the traits of a Sup HRS might be tolerance and influence (Tr. 589).* He has supervised the preparation of about 200 job analyses prepared by employers. He puts the individuals who are to actually prepare the analyses through a training period lasting two or three days (Tr. 641). He has developed what he calls a "career matrix", which took two hours to develop for the Ford Foundation (Tr. 642).

Dr. Lopez is in a unique position to see the business advantages of having Courts strike down knowledge ex-

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* Dr. Katzell testified that she was "glad" defendants did not try to test for ability to deal with people: "it is one of our more difficult problems which has not been very effectively solved." (Tr. 437).

aminations in favor of trait tests (Tr. 630-631; 638). It will take perhaps a billion dollars nationwide to change the system (Tr. 638); the cost for validating one test for bus driver was $325,000 (Tr. 648), whereas Dr. Lopez believes that for the job "the only test you need is the possession of a driver's license" (Tr. 676).

When Dr. Lopez used to prepare tests for the City in the Personnel Examiner Series, he expected the candidates "to have certain basic knowledge, be aware of certain literature on the subject, and have done some reading in these areas" (Tr. 654). As the District Court pointed out, four years earlier "God had not illuminated his mind" to the extent of testing only for traits (Tr. 659).

One is reminded of Judge Friendly's words in *Vulcan, supra,* 490 F. 2d at 394:

> "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow."

The District Court found that Dr. Lopez's criticisms of the job analysis were "sensible and persuasive".* It relied on his testimony that the knowledge and skills were too ambiguous to give any real idea about what the job involves and that Lopez would be unable to construct a content-valid test on the basis of the job analysis and test plan (353a). However, when Dr. Lopez prepared the examination for Personnel Examiner (Tr. 651), there was no "job analysis" at all (Tr. 652). Dr. Lopez worked exclusively from the "test plan" similar to the one pre-

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* Dr. Lopez agreed to testify for plaintiffs before he had seen either the job analysis or the test plan (Tr. 631-632).

pared for the exams in issue (Tr. 652). He was not only satisfied with the test plan (Tr. 652) but developed the content of the written exam from it (Tr. 653).

Presumably Dr. Lopez did not need the details from a job analysis to cloud his mind. At the very least, Dr. Lopez's testimony indicates that the sufficiency of the sample size in a job analysis should not be over-emphasized if the areas to be tested for are clearly defined (Tr. 652).

The other objections which Dr. Lopez raised, and the District Court adopted, are, we submit, not "legitimate." *Vulcan, supra,* 490 F. 2d at 393. For example, defendants' failure to indicate a "level of proficiency" is branded a "critical defect". If it is a defect, it is hardly critical. Dr. Lopez means by level of proficiency "knowledge that would ordinarily be acquired by two years of training" (Tr. 516-517). This criticism would be better taken for an outsider engaged to construct one exam. Here, Helene Willingham knew that she was constructing exams on three different levels of difficulty and they differed by 40 questions (Tr. 319-320; 413).

The District Court also found as a "serious defect" that the job analysis "does not explain how or why the skills in the test plan were weighted as they were . . . or even suggest—apart from the examples of typical tasks —that the jobs held by those in the title of Sup. HRS can be different from one another and require different abilities" (353a).

These objections are words without meaning. The weighting on the test plan speaks for itself. It is a matter of judgment on the part of the person who performed the job analysis, and is, as the District Court had just observed, a "largely inferential" step. Indeed, there is

no other way (Tr. 526). There was testimony as to the competence of Leonard Rosenberg (Tr. 405) but the Court was not overly eager to credit someone trained in classification in any respect (*supra,* fn. p. 36). There was, furthermore, testimony as to how Rosenberg weighted the areas to be tested (Tr. 199-202; 408-409; 436). The Court grudgingly conceded that Rosenberg stated the correct procedure to be followed but having given this much, retracts it by falling back on the "critically insufficient" sample.

The "tasks observed through interviews" described in the job analysis or the "examples of typical tasks" on the Notice of Examination show that these are tasks done by Supervising HRS's, not that all Supervising HRS's must do all those things (Tr. 470). The test plan specifies the knowledges and skills that are basic to doing any of these tasks (Tr. 471).

Helene Wilingham prepared the examinations in the Human Resources occupational series at issue here, as she had prepared 200 examinations previously. In part, the Court criticizes her for exercising independent judgment but the Court's principal criticisms of her question-writing technique are rooted in the deficiencies he had already found in the job analysis, i.e., "the fact that the job analysis and test plan needed refinement by Willingham suggests that they were inadequate to begin with" (357a).

In fact, defendants' experts thought the examinations were well constructed (Tr. 413; 422; 498, 503). The item analysis provides a method other than subjective judgment to check on the item construction. High scoring candidates tended consistently to select the right answer,*

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* One question was a "negative indicator"; i.e., the high scoring candidates answered incorrectly. However, it was a good question on Supervision (Tr. 420).

tending to show that the examination was a "positive indicator" (Tr. 415; 418-419; 446). Virtually all of the options, the multiple choices, were "working" and this is by itself evidence as to the adequacy of the content of the questions (Tr. 417).

The length to which the Court was willing to go in finding that defendants could do no right can be seen in its treatment of defendants' free training course to prepare HRA employees for the examination. Twenty questions, accounting for 25% of the examination, came from the training materials (Tr. 279). Defendants could not have done much better short of issuing the questions in advance. But the District Court manages to discount the value of this course by stating that "there is no evidence as to how many people attended it".

The Court further disparages defendants' training course for specifically preparing candidates on graph interpretation and reading. It seems to imply that efforts to prepare candidates in this area were in less than good faith since Helene Willingham herself was sensitive to the fact that minorities did less well on these questions. However, to tag such questions as having a "discriminatory bias" assumes the point to be proved. Whatever the disparate impact, the issue is whether the questions were job-related (Tr. 298) an issue the District Court never reached. In fact, the test plan called for such questions (195af1) and Helene Willingham would have exceeded her authority had she eliminated them entirely. Furthermore, the director of training at HRA had been associated with the agency for many years and therefore "had a good idea of the knowledges and skills that would be required for doing an adequate job" (Tr. 280-281). Dr. Katzell found these questions "quite typical of the kinds of questions one finds in many national tests" (Tr. 413).

Testing is an imperfect science (Tr. 449-450) and there is no such thing as a perfect test (Tr. 485). Our candid admission that defendants were less than perfect in item construction (Tr. 411-412)* is neither devastating to their case nor inconsistent with the major premise that the examination was, on the whole, well constructed to test for basic knowledge of the type that any Supervising Human Resources specialist ought to have to function effectively.

It is our contention that defendants' method of preparation was consistent with professionally acceptable standards of test preparation and that they were entitled to the benefit of the presumption, rebuttable to be sure, that success had been achieved. *Vulcan, supra*, 490 F. 2d at 396. The District Court, in finding otherwise, was clearly erroneous.

In focusing his attention almost exclusively on alleged imperfections in test preparation, practically as an intellectual exercise, the District Court lost sight of the main duty at hand, to evaluate the examinations themselves. That error is, we submit, fundamental and fatal.

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* Ambiguities in item construction are fertile ground for *Acosta*-type challenges, an explanation of why some "rules" are violated (Tr. 412). *Acosta v. Lang*, 13 N.Y.2d 1079 (1963). The *Acosta* challenge is the answer to Lopez's testimony, relied on by the District Court, that the test was poorly constructed "because many questions appeared to have more than one correct answer, even to an expert." In fact, there were only about 11 challenges to questions (304), which Lopez later testified was evidence of the acceptability of the questions to the candidates (679). As to the Court's statement that the examination favored those with formal education, who are test-wise, plaintiffs' witnesses were both formally educated (23; 80; 102; 157) and presumably test-wise.

POINT III

The challenged examinations were job-related in that they tested for the basic knowledge and skills necessary to perform a variety of duties as Human Resources Specialists. The District Court was clearly erroneous in finding that the examinations were not job-related without evaluating the purpose for which the exams were given and the examinations themselves.

The main thrust of defendants' proof at trial was that we were testing for sufficient knowledge so that a person appointed to the position of Sup HRS was capable of performing whatever job in the agency at the same level of responsibility and importance to which the individual might be transferred (Tr. 14-15, 26, 28-29, 43; 93-94; 132-133, 142; 297). This is consistent with a new over-all policy of "broad-banding", to consolidate and pare down the 3,000 job titles in the City's personnel system so that workers can be grouped as to equivalent occupational status to facilitate more flexibility in job assignment. "A common title will be given, for example, to relocation aides, public health assistants, and community liaison trainees, all of whom now earn the same salary and perform comparable duties". N.Y. Times, April 19, 1975, p. 34.

The cases at bar, then, are particularly important to defendants. If defendants are required to test for specific jobs "in twenty different kinds of programs" within one agency (349a), they are doomed before they begin to test for titles that span different agencies.

Defendants had clustered the varying duties around eight areas of common knowledge or skills. The exami-

nations themselves were before the Court (195ab3-195ad21). For the Sup HRS exam, 25 questions related to the functions of HRA or other public agencies and current developments and problems in the field of human services (Tr. 278). Questions 1 to 25 related to supervision and judgment in on-the-job situations (Tr. 277). Fifteen questions, Nos. 26 to 40, related to community relations and organization, and an additional 15 related to language usage and interpretations of tables and graphs (Tr. 277). The test was considered easy (Tr. 325).

The purport of Dr. Katzell's testimony was that defendants tested for what they said they were going to test for on the job analysis: the questions related to the test plan; the test plan related to the knowledge and skills required, which related to the tasks observed through interviews (Tr. 427). To that extent, the test was job-related, and performance on the test could be expected to relate to performance on the job (see 206a).

Harold Yourman, who had been with the Agency virtually from its inception (Tr. 334) and who was familiar with the functions of the agency (Tr. 352) and the title structure (Tr. 338; 342), was in a good position to evaluate whether the examinations were "content valid". He testified that in his opinion the examination for Sup HRS was job-related to the variety of duties and responsibilities of the position (Tr. 363; 342; 354-355).

In his former title as a Sup HRS, Yourman was responsible for labor relations within HRA (Tr. 379). The District Judge stated that Yourman "conceded that the exam was not directly related to his earlier duties as a provisional Sup HRS." The District Judge apparently believed that Yourman should have been tested on labor relations. Yourman testified that on the challenged examination, "there was nothing specific in labor relations, but I would be responsible in my area to know about other areas in the Agency" (Tr. 395).

Plaintiff Jones was also working as a Sup HRS in labor relations (Tr. 45). There was not a single other Sup HRS doing the same type of work (Tr. 47). Questions in the area of labor relations, Jones testified, would be "totally baffling to anyone who hasn't had some experience in the area" (Tr. 53).

Indeed, far from rebutting defendants' case, the plaintiffs' testimony at trial went far in the other direction towards proving it. Each witness testified to widely varying duties and responsibilities in a range of Agency positions. They then testified that the examinations were not job-ralated, as if defendants should have tested for the specific duties of, for example, Parent Coordinator in the Agency of Child Development (Tr. 101) or Assistant to the Deputy Director of Labor Relations (Tr. 45) or Education Specialist in the Community Development Agency (Tr. 152; 158-162).

From its appearance under subdivision "F" in the Opinion, the District Court treated defendants' main defense as if it were peripheral to the issue to be decided. He had already decided against them on the issue of job-relatedness, purportedly on the basis of "opinion testimony as to the content validity of the exam itself". The content validity of an exam, however, is not an intellectual concept to be decided by the Court in a vacuum by simply choosing between conflicting opinion testimony. It is a factual determination: did the examinations properly test for the duties and responsibilities of the position? It can only be decided by considering the examinations in light of the position being tested for. Since the District Court had made up its mind against defendants on the basis of the job-analysis and the "opinion testimony", it did not bother to evaluate the examinations. This is squarely at variance with what this Court has

only recently indicated as the correct approach: "the trial judge could not confine himself to an examination of the process of preparation while completely ignoring the merit of the result." *Kirkland* v. *N.Y. State Dep't of Correctional Services, supra,* slip. op. at 5405.

While, based on the approach here adopted by the District Court, it is not surprising that the Court gave short shrift to defendants' argument that they were testing for sufficient knowledge of a position to permit appointment to a wide variety of jobs and not for any individual job, the extent of his misunderstanding is revealing. The District Court cites as an "obvious example" of failure to have established a common core of skills the fact that 20-25% of the questions on the Supervising HRS exam related to supervision when only 60% to 65% of the employees have supervisory responsibility. The defect is apparently that those provisionals who currently do not have supervisory responsibility should not be tested on supervision.

The District Court might have referred to Dr. Lopez for an explanation as to why these questions were given. Dr. Lopez testified that it would be proper to test prospective Personnel Examiners on how to prepare a job analysis even though they did not in fact prepare job analyses (Tr. 654). The reason he gave was that once on the list (Tr. 655)

> "they could fill any vacancy that came up . . . We weren't testing for what he might do [in fact]. We felt that regardless of whether you were in training, classification, examining, there is certain knowledge about these other disciplines or the subdisciplines that you should possess. A good personnel man in the [selection] field knows classification and compensation . . . He would have to

> know the purposes of a job analyses, and also be familiar with the various ways of conducting it . . . I would expect them to have basic knowledge . . ."

Dr. Lopez would expect the same basic knowledge, in his field, of a Supervising Human Resources Specialist (Tr. 656). In fact, Dr. Lopez testified that the Sup HRS test measured knowledge (Tr. 605). As for the questions on supervision, Dr. Lopez considered himself informed enough in that area to test himself (Tr. 591; 695; 681). He got 24 right out of 25, which is at least some evidence that the questions tested for what they were supposed to test. Plaintiff Jones testified that the questions on supervision were relevant to all the jobs in the title (Tr. 65-68; see also 89; 98).

The questions on the Sup HRS promotional exam, dealing with the functions of HRA and current developments and problems in the field of human services, provide another example of the inadequacies of the Court's analysis. Plaintiffs testified that the position of a Supervising HRS is a professional and very responsible position, which might entail the interpretation and application of federal laws and programs (Tr. 50; 128-129, see Tr. 339). They testified that it would be important to know changes in federal law which might affect one of the programs run by HRA (Tr. 129). Since the Agency deals with low-income people who are likely to need a variety of services from the City, it would be important to know what programs the Agency offers (Tr. 130; 141-142).

The only comment the District Court makes on this area is that

> "It is difficult to see how such questions can be considered essential to all those in the title in view

> of the fact that the *open competitive* exam for Sup HRS omitted these questions in favor of more general questions dealing with 'Functions of Relevant Public and Private Agencies.'"

Putting aside the fact that in a civil service jurisdiction the promotional candidates are customarily favored and there would be no rationale for appointing them first if the examinations for the same position were identical, the District Court misses the point. The correct inquiry is whether the functions of the agencies dealing in the anti-poverty and social welfare areas are relevant areas of knowledge on which to test individuals to be employed in the Agency, not whether individual questions which test these areas are identical. Cf. *Vulcan* v. *Civil Service Comm'n, supra,* 490 F. 2d at 395. The District Court never addressed itself to this issue.

The District Judge concludes that we could not have been successful in testing for a common core of knowledge and skills because substantial numbers of provisionals failed, although their performance had been rated as satisfactory.* This simply states the case before the Court. It was the Court's duty to evaluate the examinations—which he did not do—in light of the purpose for which they were given, a purpose to which he had closed his mind.

When all is said and done, defendants are faulted for not giving a predictively validated test which, as the Dis-

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* The impressions of two supervisors should not be given undue weight in the absence of objective performance criteria (Tr. 531-532; 541-543). See *Albermarle Paper Co.* v. *Moody,* —— U.S. ——, 45 (1975) L. Ed. 2d 280, 305. The bulk of the provisionals were evaluated on a gross satisfactory-unsatisfactory scale (Tr. 557). It is typical that individuals get satisfactory ratings on such a scale (Tr. 455-456).

trict Court viewed it, is the only reason for giving an examination (359a). Most of the transcript references in support of the Court's statement refer to Dr. Lopez, who today tests only for traits, but yesterday tested for knowledge and may do so tomorrow. However, defendants did not pretend to have given a test which empirically predicted success (Tr. 545-546). As in any knowledge test, the inference is made that if the knowledge is there, it will be usefully applied (Tr. 438). It is hard to see why testing for traits promises a better result. A fire officer may have commendable decision-making ability. He might make the wrong decision at a fire, especially if he has been promoted solely on the basis of his trait, and not on the basis of knowledge of fire-fighting techniques. As the Court itself here noted, "the critical question is whether the challenged procedure is constitutionally sound, not whether a better one could have been devised" (326a).

It is defendants' position that they were entitled to a rebuttable presumption that the examinations were job-related. Even without a favorable presumption working in their favor, they proved that the examinations tested for sufficient basic knowledge to permit persons appointed to the positions of Human Resources Specialist to work in a variety of jobs throughout the Agency. Plaintiffs themselves attested to the variety. It was reversible error for the Court to have found that the examinations were not job-related without evaluating the purpose for which they were given and, in light of such purposes, the examinations themselves.

CONCLUSION

The order and judgment appealed from should be reversed and the complaints dismissed.

August 27, 1975

Respectfully submitted,

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ADDENDUM

Tables I and II

[PHOTOSTATS]

(Opposite) ☞

TABLE 1

Challenged Exam No. 1631 (Sup. HRS) (Prom.)

	Pass	Fail	Total	% Passing
Blacks	12	57	69	17%
Whites	28	24	52	54%
Hispanics	3	13	16	19%
Unknown	—	1	1	
	43	95	138	

Challenged Exam No. 2013 (Sup. HRS) (OC)

	Pass	Fail	Total	% Passing
Blacks	39	208	247	16%
Whites	125	108	233	54%
Hispanics	3	17	20	15%
Others	5	3	8	63%
Subtotal	172	336	508	
Unknown	183	303	486	38%
	355	639	994	

Challenged Exam No. 1626 (Sr. HRS) (Prom.)

	Passed	Failed	Total	% Passing
Blacks	11	51	62	18%
Whites	30	4	34	88%
Hispanic	3	5	8	37%
Other	—	2	2	
	44	62	106	

Challenged Exam No. 1099 (Sr. HRS) (OC)

Blacks	56	165	221	26%
Whites	101	54	155	65%
Hispanic	8	22	30	27%
Subtotal	165	241	406	
Unknown	90	187	277	32%
	255	428	683	

Challenged Exam No. 1097 (HRS) (OC)

Blacks	55	120	175	31%
Whites	59	56	115	51%
Hispanics	7	29	36	19%
Other	1	1	2	
Subtotal	122	206	328	
Unknown	78	200	278	28%
	200	406	606	

TABLE II

HRS Promotional Exam No. 1625

	Passed	Failed	Total	% Passing
Blacks	13	36	49	27%
Whites	1	4	5	20%
Hispanics	—	4	4	
	14	44	58	

Sr. HRS (MDT) Open Competitive Exam No. 1094

	Passed	Failed	Total	% Passing
Blacks	18	41	59	31%
Whites	5	10	15	33%
Hispanics	7	15	22	32%
Other	—	1	1	
Subtotal	30	67	97	
Unknown	18	78	96	19%
	48	145	193	

HRS (MDT) Open Competitive Exam No. 1095

	Passed	Failed	Total	
Black	12	44	56	21%
White	8	9	17	47%
Hispanic	7	16	23	30%
Subtotal	27	69	96	
No ethnic info	12	74	86	14%
	39	143	182	

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